

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

**MARIA BRUNN, VERCELIE DAVIS,
AND 11 OTHERS,**

Plaintiffs,

v.

**XTRA SUPERFOOD CENTERS, INC.,
d/b/a PUEBLO SUPERMARKET and
MUTUAL MARINE INSURANCE COMPANY,**

Defendants

CIVIL NO. 2000/131

TO: Lee J. Rohn, Esq.

John Zebedee, Esq. - Hymes & Zebedee - Fax 775-3300

Douglas Beach, Esq. - Dudley & Chan - Fax 776-8044

ORDER GRANTING XTRA'S AMENDED MOTION TO QUASH SERVICE

THIS MATTER came consideration on Defendant Xtra Superfood Center Inc.'s Amended Motion to Quash Summons. Plaintiffs filed opposition to the motion¹. Xtra filed a reply to such opposition.

In support of its motion Xtra asserts the following:

1. Plaintiffs' summons is addressed to "defendant"

"Adrianne J. Dudley, Resident Agent for Xtr Superfoods Center Inc." and is deficient because Adriane J. Dudley is not a party to this action and she is not the

1. Plaintiffs actually filed two oppositions, one on November 20, 2000 and one on November 22, 2000. The Court has considered the more comprehensive latter.

registered agent for any entity named "Xtr Superfoods Centers, Inc."

2. Plaintiffs improperly served the receptionist at Dudley, Clark & Chan who is not an authorized or registered agent for Defendant, Xtra Super Food Centers, Inc.
3. The Summons that Plaintiff attempted to serve appears to have been issued for service of Plaintiffs' initial Complaint as it was executed at least two (2) days prior to filing of Plaintiffs' First Amended Complaint thereby rendering such process improper under Fed. R. Civ. P. 4(b).

In opposition to the motion, Plaintiffs assert that:

1. Courts may overlook minor technical defects in the name of a party served absent showing that Defendant did not receive notice or had suffered any prejudice from the technical error.
2. The receptionist at Dudley, Clark & Chan has been served repeatedly with Summons on behalf of Pueblo (Xtra). Plaintiffs cite *Carlson v. Metmor Financial, Inc.*, 26 V.I. 79, 80-81 (Terr. Ct. 1991) and argue that process may be served upon an office recipient who

"understands the importance of the summons and complaint and will feel duty bound to make sure the employer will promptly receive those papers."

In its reply, Xtra asserts that it has consistently denied personal jurisdiction in those cases cited by Plaintiffs where the Dudley, Clark receptionist was served with process for Xtra.

With regard to Xtra's assertion that Plaintiffs' Summons was prematurely issued thereby rendering such process improper under Fed. R. Civ. P. 4(b), the Court rejects such assertion and incorporates herein the applicable portion of the companion order granting Defendant Mutual Marine's Amended Motion to Quash Service.

Likewise, the Court rejects Xtra's assertion that Adriane Dudley is named as a Defendant in the Summons. The Summons clearly is directed to "Adriane Dudley, Resident Agent for Xtr Superfoods Centers, Inc." and attorney Dudley's name does not appear in the Summons caption or the caption and body of the accompanying Complaint.

The designation in the Summons of "Xtr Superfood Centers, Inc." instead of "XTRA Superfood Centers, Inc." is an apparent misprint as the Defendant is otherwise properly designated in the caption of such Summons and in the caption and body of the

accompanying Complaint. Such inconsequential mis-designation constitutes no basis for granting this motion. *Morrel v. Nationwide Fire Insurance Co.*, 188 F.3d 218, 224 (4th Cir. 1999); *Libertad v. Welch*, 53 F.3d 428, 440 (1st Cir. 1995); *Louisiana Acorn Fair Housing v. Quarter House*, 952 F.Supp. 352, 355 (E.D. La. 1997); *Veremis v. Interstate Steel Co.*, 163 F.R.D. 543, 545 (N.D. Ill. 1995); *Crane v. Battelle*, 127 F.R.D. 174, 177 (S.D. Cal. 1989).

The service upon a receptionist at the office of the Registered Agent for Defendant Xtra presents an issue for which there is little direct precedent. Fed. R. Civ. P. 4(h) (1) provides for service upon a foreign corporation in a judicial district of the United States in the manner provided in subdivision (e) (1), "or by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to Defendant." (emphasis added).

Fed. R. Civ. P. 4(e) (1) provides for service in any judicial district of the United States:

Pursuant to the law of the state in which the district

court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the state.

With regard to the law of the Virgin Islands, 13 V.I.C. § 401(a) requires that all foreign corporations must name an authorized agent in the Virgin Islands upon whom service of legal process against the corporation may be made. 5 V.I.C. Ch. 7 contains no provisions for service upon a resident agent of a foreign corporation. 5 V.I.C. § 4911 has application only to service outside the Virgin Islands. Territorial Court Rule 27(b), provides only that process shall be served in the same manner as required by Rule 4 of the Federal Rules of Civil Procedure.

In support of its contention that service on the law firm's receptionist was insufficient, Xtra cites *Royal Bank of Canada v. Suarez*, 22 V.I. 178, 180 (D.V.I. 1986); and *Lensel Lopez v. Cordero*, 659 F.Supp. 889, 890 (D.P.Rico 1987).

The Royal Bank case concerned service on an individual Defendant through her ex-husband and was analyzed pursuant to the portions of the Fed. R. Civ. P. Rule 4 applicable to service on individuals [now 4(e)]. In *Lopez*, the court also considered service on an individual through a secretary at his place of business. Xtra asserts that attorney Dudley *qua* resident agent of

Xtra may only be served in the same manner as an individual Defendant.²

In opposition to the motion, Plaintiffs cite *Carlson v. Metmor Financial, Inc.* 26 V.I. 79, 80-81 (Terr. Ct. STX 1991). In *Carlson*, service was made on a corporate Defendant at the corporate office through an employee designated as "administrative assistant" who later provided an affidavit that she was actually a receptionist, secretary, and file clerk with no managerial duties. The court considered Fed. R. Civ. p. 4(d)(3) and found the term "managing or general agent" to be broadly construed to apply to a person in such position "that there is a high probability that the papers will reach those persons in the organization responsible for protecting the firm's interest in the litigation." The court considered *inter alia* that the employee had accepted similar service on other occasions and that the papers were indeed transmitted to the proper persons.

Other courts have allowed service of process directed to a corporation to be served upon appropriate secretary/receptionist at the corporate offices. See e.g. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 689 (9th Cir.

2. Xtra generously offers that attorney Dudley may be served at home as provided in Rule 4(e)(2). (Xtra reply mem. p. 2).

1988); *Melkaz International, Inc. v. Flavor Innovation, Inc.*, 167 F.R.D. 634, 641 (E.D. N.Y. 1996); *Koninklijke Luchtvaart Maatschappij, N.V. v. Curtiss-Wright Corp.*, 17 F.R.D. 49, 51 (S.D. N.Y. 1955).

The instant matter concerns service upon an individual designated as resident agent for a foreign corporation doing business in the Virgin islands, who was not served at corporation offices, but rather at her law firm's offices through a secretary of the law firm. Accordingly, such service presents hybrid issues that do not slot neatly into either Xtra's contended individual service or Plaintiffs' contended service on an appropriate corporate officer.

In *Gottlieb v. Sandia American Corp.*, 452 F.2d 510, 513 (3d Cir. 1971), *cert. den.* 404 U.S. 938, the court considered service made upon Wechsler, an individual defendant who was also a controlling stockholder of the defendant corporation. The court emphasized that the issue was not one of constitutional due process but of compliance with the Federal Rules of Civil Procedure and found that Plaintiffs had failed to provide that Wechsler was a managing or general agent of the corporation and that he was served in a representative rather than individual capacity. *Id* at 514.

In reaching such conclusion, the court noted that the Rules

distinguish between service of one in his individual capacity and service of one as a representative of a corporation, "...But there is no provision under Rule 4(d)(3) for substituted service on the corporation's representative. Copies of the summons and complaint must be delivered to the officer or agent. [Fn 7]." Footnote 7 states, "service under this part of the rule cannot be made as it may be made on individuals pursuant to Rule 4(d)(1), by leaving a copy of the summons and complaint at the officer's or agent's dwelling house or usual place of abode with a person residing therein.³ And generally speaking, the process cannot be left with someone at the officer's or agent's office." (emphasis added). *Id.*

In *Swanson v. Precision Sales and Service, Inc.*, 832 P.2d 1109, 111 (Col. 1992), the court held that delivery of process to a registered agent of a corporation may be accomplished in the same manner as a "natural person" may be served. The Colorado Court of Appeals noted that such conclusion seems to be at variance with the rule established by the federal courts (citing *Gottlieb*). In another case, delivery of process to a secretary of a registered agent at such registered agent's usual place of business was upheld

3. In such regard, see also: *In Re: Eizen Furs, Inc.*, 10 F.R.D. 137, 138-139 (E.D. Pa. 1950).

as valid pursuant to a particular Colorado statute.⁴ *Merril Chadwick Co. v. October Oil Co.*, 725 P. 17, 18 (Col. 1986).

Upon consideration and in reliance upon *Gottlieb* absent precedent to the contrary, the court finds that Plaintiffs have not properly served Xtra. Having said that, the Court also notes that Xtra's motion and this Order represent a triumph for expense and delay over cost reduction and efficiency. Xtra has undoubtedly incurred substantial cost from this motion and will accrue no substantive gain therefrom. Plaintiff will effectuate service⁵ and the case will proceed to further consideration.

Accordingly, it is hereby;

ORDERED as follows:

1. Xtra's Amended Motion to Quash Summons is GRANTED.
2. Plaintiffs may procure and serve an Amended Summons on Xtra within 120 days of any Order to be entered on Plaintiffs' renewed Motion to Amend Complaint. The parties are encouraged to cooperate in such endeavor to avoid further unnecessary cost and delay.

4. Enactment of an appropriate Virgin Islands statute concerning service of process on corporations would likewise be beneficial to future cases.

5. To the extent attorney Dudley must be personally served such service may be inconvenient or bothersome to her.

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3. Xtra's request for costs and fees is DENIED.

ENTER:

Dated: January 4, 2001

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk